THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0012-2010

(Arising from MBR-00-CV-CS-0239-2001)

KATAKANYA & OTHERS:::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

RAPHAEL BIKONGORO :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

KATAKANYA & OTHERS *(hereinafter referred to as the "Appellants")* filed this appeal challenging the decision of Her Worship Esta Nambayo, the Chief Magistrate - Mbarara Court *(hereinafter referred to as the "trial court")* delivered on the 11/03/ 2010, in ***Civil Suit No. 0239 of 2001***. The judgement was passed in favour of ***RAPHAEL BIKONGORO*** *(hereinafter referred to as the "Respondent").*

Background.

The Appellants are members of ***M/s Rwera Ranching Co-operative Society*** *(hereinafter referred to as the "Society").* They previously sued ***M/s Kirinyegye Livestock Farm Ltd***. *(hereinafter referred to as the "Company")* over ownership of land comprised in ***Kashari Block 8, Plot 11, LRV. 1195 Folio 20*** *(hereinafter referred to as the "suit land")*. The Society lost the case in the High Court and the Supreme Court, which declared the Company as the lawful owner to the suit land.

Earlier on in 1986, the Respondent had entered the suit land with the consent of the registered owner. He occupied 50 hectares thereof and subsequently in 1989, he bought off his interest in the suit land at the request of the registered owner. The Company later mortgaged the entire title to the suit land with the Uganda Commercial Bank (UCB) and obtained a loan, which it failed to repay. The bank foreclosed, and in March 1996 advertised and sold the suit land to a one Lukyamuzi.

The Appellants allege, albeit without supporting proof, that H.E the President compensated the said Lukyamuzi, who had purchased the mortgage, and in 1997 gave the suit land to the Society of which the Appellants are members. The Appellants then sought to take over the entire suit land which included the Respondent's portion. The Respondent instituted a suit against the Appellants in the trial court seeking orders and a declaration that the Appellants were trespassers on his land, a permanent injunction restraining them from further and future acts of trespass, general damages, and costs of the suit. The trial court held in favour of the Respondent hence this appeal.

On appeal the Appellants preferred five grounds as follows:

1. ***The learned Chief Magistrate erred in law to hold that the purchase of the land was legal when;***
   a) ***The seller had no property to sell.***
   b) ***The process of the sale was tainted with glaring illegalities.***

2. ***The learned Chief Magistrate erred to hold that the Sale Agreement could be relied on because it was not challenged when it was tendered although it was clearly an illegal document.***
3. ***The learned Chief Magistrate erred to hold that the respondent was a bonafide purchaser and a lawful occupant when it was clear from the evidence that the alleged purchase and occupancy were tainted with malafides.***

4. ***The learned Chief Magistrate erred to award general damages without a background, basis and justification.***

5. ***The learned Chief Magistrate erred for failure to weigh the evidence and to realise that the plaintiff did not prove his case on the required standard.***

The Appellants prayed that the trial court's decision be reversed, and the appeal be allowed with costs on appeal and the court below.

The duty of this court, as a first appellate court, is to re-appraise the evidence adduced at the trial and subject it to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to

bear in mind that it has neither seen nor heard the witnesses and should, therefore, make due allowance in that respect. This duty was well stated in ***Selle v. Associated Motor Boat Co. [1968] E.A 123*** and followed in ***Sanyu Lwanga Musoke v. Galiwango, S.C Civ. Appeal No.48 of 1995; Banco Arabe Espanol v. Bank of Uganda, S.C.Civ.Appeal No.8 of 1998.*** With this in mind, I proceed to the consideration of the grounds as preferred above.

Mr. Mwene – Kahima represented the Appellants, while ***Mr. Ngaruye - Ruhindi*** represented the Respondent. Both Counsel filed written submissions. Counsel for the Respondent started off with preliminary points which, in my view, ought to be disposed of at the earliest pursuant to ***Order 6 r.28 of the Civil Procedure Rules (CPR)*** that where issues of law are raised they should be disposed of at the earliest; just in case they determine the suit partly or entirely.

The first preliminary point is that the appeal was filed out of time, because the Memorandum of Appeal was lodged on 12/04/ 2010, whereas the decision being appealed was delivered on 11/03/ 2010; and that this offends provisions of ***Section 79*** of the ***Civil Procedure Act (CPA)*** to the effect that an appeal shall be filed within thirty days of the date of the decision against which the appeal lies.

In response, Counsel for the Appellants submitted that the appeal was filed within time, and that the 11/04/ 2010 which was the last possible date of filing the appeal fell on a Sunday, and thus they filed the same on the 12/04/ 2010, which was a Monday, hence within the statutory time limit.

Resolving this point, in my view, brings into play the ***Section 79 (1) (a) CPA*** which governs the time for filing appeals. The section stipulates that every appeal shall be entered within thirty days of the decree, and should be read together with ***Order 21 r.7 (1) CPR*** which requires that a decree shall bear the date of the day on which the judgment was delivered. At the same time, ***Order 51 r.3 CPR*** which regulates the procedure as to the time for filing actions in court provides that where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof the act or proceeding cannot be done or taken on that day, that act or proceeding shall, so far as regards the time of doing or taking the act or proceeding, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

In the instant case, the thirty days period invariably fell due on 10/04/ 2010, which was a Saturday when courts are ordinarily closed to business. The Appellants filed their appeal on 12/04/ 2010, which was a Monday - the day on which the court registry was next open. Therefore, the appeal is regarded as having been duly filed well within time stipulated by law, and there would be no need to seek leave of court, as submitted by Counsel for the Respondent. The preliminary point lacks merit and it is overruled.

The second preliminary point relates to the issue of court fees. Counsel for the Appellant submitted that fees for filing the instant appeal were paid on 16/04/2010, which would be considered the day on which the appeal was filed, which means that the appeal was filed four days out of time. That this was an irregularity under the law because no document is filed until fees are paid. Counsel relied for this proposition on the cases of ***Ishanga Longino v. Bitahwa Nyine Samson, HCT-05-MA-0036 of 2002 and Christopher Katuramu v. Lawrence Muwanga v. Stephen Keyune, S.C.Civil Appeal No. 12 of 2001 Maliya & 3 Ors [1992-1993].***

Counsel for the Respondent countered that the plethora of authorities cited are obsolete on the issue of payment of court fees, and cited the cases of ***Amama Mbabazi & A' nor v. Musinguzi Garuga James****, C.A.* ***Civil Appeal, No. 12 of 2002; and Lawrence Muwanga v. Stephen Keyune, Civil Appeal No. 12 of 2001.*** Both cases are to the effect that non payment of court fees is a minor procedural technicality that should not affect the adjudication of substantive issues.

The issue of payment of fees is well settled. In ***Lawrence Muwanga v. Stephen Keyune, (supra)*** which cited with approval the decision in ***Yese Ruzambira v. Kimbowa Builders & Construction Ltd (1976) HCB 278***, it was held that;

> ***"A complaint against non - payment of court fees is a minor procedural and technical objection which does not; and should not, affect the adjudication of substantive justice as envisaged in Article 126 (2)(e) of the 1995 Constitution of Uganda …"***

Further, in the cited case of ***Amama Mbabazi & A' nor v. Musinguzi Garuga James (supra),*** it was held, *inter alia*, that court can order for payment at any stage of the proceedings where

it finds that fees were not paid, and if fees are paid the document and/ or any proceedings relating thereto shall be as valid as if the proper fees had been paid in the first instance.

When the stated principles in the above cases are applied to facts of the instant appeal, it would follow that because the appeal raises substantive issues as to proprietary rights over land, it ought to be determined on merits without undue regard of a mere procedural technicality of delayed payment of court fees. To do otherwise would be contrary to the spirit and the letter of ***Article 126(2) (e) of the Constitution,*** which enjoins courts to administer substantive justice without undue regard to technicalities. This is more so in light of the fact that the court fees in the instant appeal were actually paid a few days after filing in. The preliminary point in that regard thus fails and it is overruled.

The third preliminary point is that the provisions of ***Section 220(1) (a) Magistrates Courts Act (MCA)*** require that an appeal should be lodged against a ***decree or an order***, and that the Memorandum of Appeal in the instant case makes no such a reference to any decree or order, but simply to a decision; which makes the appeal incompetent.

In rejoinder Counsel for the Respondent submitted that the decree actually exists and was signed by the trial court on 11/03/2010. Further that the extraction and attachment of a decree is no longer a mandatory requirement. For this proposition Counsel relied on the case of ***Banco Arabe Espanol v. Bank of Uganda (1996) HCB 12.***

I have not found the arguments in support of the above latter preliminary point plausible as they tend to hinge solely on a mere technicality that does not stand the weight of the substantive law. It is trite law that the extraction of a decree is no longer a mandatory legal requirement in instituting an appeal. In ***Banco Arabe Espanol v. Bank of Uganda (supra)*** cited by Counsel for the Appellant, the court, after finding that the decree was not properly extracted as required by law, nonetheless, reiterated the position in ***Kibuuka Musoke William & A' nor v. Apollo Kaggwa, Civ. App. No. 46 of 1992;*** and stated thus;

> ***"...it is clear from the above provisions that the extraction of a formal decree embodying the decision complained of is no longer a legal requirement in the institution of an appeal. An appeal by its very nature is against the judgment or a reasoned order and not the decree extracted from the judgment or the reasoned***

order. The extraction of the decree was therefore a mere technicality which the old municipal law put in the way of intending appellants and which at times prevented them from having their cases heard on merits. Such a law cannot co-exist in the context of the 1995 Constitution, Article 126 (2) (e) where courts are enjoined to administer substantive justice without undue regard to technicalities. "

Importantly, by definition under ***Section 2(i) CPA*** a judgment is a statement given by the judge of the grounds of a decree or order. Similarly, ***Article 257 (O)*** of the ***Constitution*** defines the term "judgment" to include a decision, an order or decree of the court. In effect, by the Appellants stating that the appeal is from a decision instead of a decree, it does not render the appeal incompetent. This preliminary point is also devoid of merit and it is overruled. I will proceed to consider the grounds of appeal on merits.

GROUND 1.

The Appellants' complaint in this ground is two pronged. Firstly, that the trial court erred in law and fact to hold that the purchase of the suit land by the Respondent was legal when the seller had no property to sell, and secondly, that the process of sale was tainted with glaring illegalities.

To support the first limb of the ground, the Appellants advanced the view that the seller had no land to sell since he had mortgaged the entire suit land, including the part claimed by the Respondent to UCB, which later foreclosed and sold the land off. For the second limb of the ground they contend that the Respondent was previously a member of the Society of the Appellants, and was well aware of the existence of a dispute the Company had over the suit land with the Society, and that in buying the suit land whose status he knew well, the Respondent could not do a legitimate transaction, but only went behind the Appellants' back to conclude the purchase.

In reply Counsel for the Respondent submitted that the Appellants have no *locus* to question the sale between the registered owner and the Respondent because they did not plead or adduce evidence to show that they are *bona fide* or lawful owners and/or occupants. That when they attempted to sue the Company over ownership of the suit land they were defeated in the Supreme Court which declared the Company; not the Appellants, as the lawful owner.

It is my view that the starting point is the *locus standi* of the Appellants in this matter. ***Section 59*** of the ***Registration of Titles Act (Cap 230) (RTA)*** provides that possession a certificate of title is conclusive evidence of ownership, which the Appellants lacked at the time of the sale to the Respondent. The evidence at trial (at page 4, line 20 of the proceedings) shows the Company was the duly registered proprietor when the Respondent occupied and bought portion of the suit land. The respondent had been declared the lawful owner by the Supreme Court; a fact which was effectively corroborated even by the testimonies of some of the Appellants, including DW1, Katakanya Nathan (at page 12 line 6 of the proceedings) and also by DW2, Zaburoni Ibabaza (at page 14 line 35).

It would follow that the registered proprietor could legally deal with the land as it pleased, including selling it to the Respondent. The Appellants had no *locus standi* to institute a suit against the Respondent for having bought part of the suit land, and on that account alone there would be no illegalities in the sale transaction as between the Respondent and the registered proprietor.

The mere fact that the Respondent was aware of the disputes over the land would not in itself render or constitute illegalities in the sale transaction. In fact, at page 5 of the proceedings, the Respondent acknowledges that he had known of the said dispute, but that the Company which sold to him legally owned the land title (at page 6, line 21 of the proceedings), and that the said dispute had been resolved by the Supreme Court by the time of sale. The Society never possessed any title that would prevent the Respondent from buying.

It is also noted from the Sale Agreement *(Exhibit P1)* that the Respondent duly purchased 50 hectares of the entire suit land at the request of the registered owner at the time when the land was free from any encumbrances. In addition, the evidence (at page 5, lines 4 and 5 of the proceedings) clearly shows that by the time of the purchase in 1989, the suit land was not yet mortgaged with the UCB. The Respondent only got to learn of that fact later in 2004. Evidently, the mortgage was created subsequent to the occupation and purchase of the land by the Respondent, and hence he held equitable interest/rights to which all future transactions on the land would be subject; including the later mortgage.

It follows then that UCB, which entered into mortgage arrangements with the Company on the land occupied by a third party, other than the mortgagee, would be bound by the existing

equitable rights of the third party in the land. The bank ought to have carried out inspection of the land in the process of creating the mortgage, and if it did, it would have unfailingly found out that the Respondent was on the land as a tenant by occupancy and had protected equitable interest, albeit unregistered.

My findings above are buttressed by the case of ***Uganda Telecommunications v. Abraham Kitumba & Or's, S.C.Civil Appeal No. 36 of 1995,*** where it was held that if a person purchases (or as in the instant case mortgages) an estate of land which he or she knows to be in occupation of another other than the vendor, he or she is bound by all the equities which the parties in such occupation may have in the land.

Flowing at par with the above authority, it is logical that even if the unproven claims by the Appellants were true that H.E. the President paid off Lukyamuzi, who had bought the mortgage, and gave the suit land to the Appellants' Society, still such a process would abide by the equities of the Respondent in the land, which no amount of Presidential donation would extinguish. The Respondent is a lawful occupant on the suit land whose interest is duly protected under the law against other adverse claims.

It should be emphasised that even if now the Society members (Appellants) could have obtained the certificate of title over the land, it is still subject to the Respondents stated interest. ***Section 64(2)*** of the ***RTA*** provides, *inter alia*, that a certificate of title is subject to any rights subsisting under any adverse possession of the land. This means the Appellants would still have no basis to interfere with the unregistered interest of the Respondent in the manner they did. The law recognises the unregistered interest of tenants in occupation of registered land, and a party taking possession of registered land is bound by the subsisting rights of those lawfully in occupation; whether registered or not. Ground 1 of the appeal entirely fails.

GROUND 2.

The Appellants criticised the trial court for holding that the Sale Agreement *(Exhibit P1)* could be relied on because it was not challenged when it was tendered. Counsel for the Appellants argued that the Sale Agreement was illegitimate because, in the first place, there was allegedly no land to sale, and secondly that the purchaser bought land that was in dispute

without the knowledge of the Society; to which he was a member. That the Respondent bought "*behind the back of the Society*".

I find the ground and submissions in support thereof purely tautological and a replication of points already covered under ground one above. It is not necessary to go over them again. Accordingly, the resolution of ground 1 effectively disposes of ground 2; which also fails.

GROUND 3

The Appellants fault the trial court for holding that the Respondent was a *bonafide* purchaser and a lawful occupant when it was clear from the evidence that purchase and occupancy were tainted with *malafides.* The Appellants point to the same facts as in grounds 1, 2 and 3, that the Respondent could not have lawfully purchased the suit land when he was aware of the existing dispute on it, and that he went behind the back of the Society members and purchased the suit land which was mortgaged hence there was no land to sell.

Counsel for the Respondent submitted, in reply, that there is nothing *malafide* in the sale transaction between the Respondent and the registered owner just because the Respondent was previously a member of the Society. That one can belong to and later cease to belong to a Society and even act against its wishes

At the risk of repetition, I restate that there are no proven *malafides* whatsoever as alleged, on basis of the evidence available. I have also not found in the trial court's judgment anywhere that the Respondent is referred to as a *bonafide* purchaser as claimed by Counsel for the Appellants. Therefore, I will restrict my consideration of the remaining part of this ground only on the issue of a "lawful occupant" and how it was dealt with by the trial court.

At page 5 of its judgment, the trial court, rightly in my view, set out the definition of "a lawful occupant" and "*bonafide* occupant" as given under the ***Land Act (Cap 227***). Under ***Section 29(1) (b)*** thereof, a "lawful occupant" is defined to mean a person who entered the land with consent of the registered owner, and includes a purchaser. On the other hand, a "*bonafide* occupant" under ***Section 29(2(supra)*** is one who, before the coming into force of the ***1995 Constitution***, had occupied and utilised or developed any land unchallenged by the registered owner for twelve years or more.

Article 237(8) of the Constitution provides that:

> ***"Upon the coming into force of this constitution and until Parliament enacts an appropriate law under Clause (9) of this article, the lawful or bonafide occupants of mailo land, freehold or leasehold land shall enjoy security of occupancy on the land."***

Clause (9) thereof enjoined Parliament, within two years of coming into force of the ***Constitution,*** to enact laws to regulate the relationship between lawful and *bonafide* occupants and registered owners of land. Subsequently the ***Land Act (supra)*** was enacted, and ***Section 31(1)*** thereof provides that;

> ***"A tenant by occupancy on registered land shall enjoy security of occupancy on the land."***

The Constitutional and Statutory implications to facts of the instant case is that the Respondent is considered a lawful occupant, and hence enjoys protection under the law; not only because he purchased and occupied the land, but also utilised it with the consent of the registered owner. See also ***Kampala District Land Board & A'nor v. National Housing & Construction Corporation, S.C.Civ.Appeal No. 02 of 2004.*** Therefore, the trial court rightly found that the Respondent was not a *bonafide*, but a lawful occupant, hence protected by law, and no *malafides* could be imputed in the sale transaction between the Respondent and the registered owner. This ground of appeal must fail.

GROUND 4.

Counsel for the Appellant criticised the trial court for awarding general damages of Shs. 10 Million against the Appellants without a background basis and justification. Further, that the pleadings for general damages are vague, as no particulars are pleaded on the subject and that the Respondent never led evidence as to what he lost. Counsel also argued that the trial court just sprung the figure of Shs. 10,000,000/= without stating the reason why it awarded the amount.

Counsel for the Respondent countered arguing that the Respondent actually pleaded general damages, and proved them by evidence that since 2001, he has been deprived of the use of

his land and suffered damage as he had nowhere to cultivate and graze his cattle. Counsel further submitted that the trial court took these factors into account to reach the figure of Shs. 10 million even though the Respondent had prayed for Shs. 20 million.

It is called for to restate the law as it relates to general damages in general and how they are assessed and awarded in particular. General damages are awarded at the discretion of court, and are always as the law will presume to be the natural consequence of the defendant's act or omission. ***See James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993***.

In the assessment of the quantum of damages, courts are guided mainly, *inter alia,* by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach. See ***Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305***. Similarly in ***Musisi Edward v. Babihuga Hilda [2007] HCB Vol. 1 pg 84*** it was held that to be eligible for general damages the party should have suffered loss or inconvenience to justify award of general damages.

Furthermore, a party who suffers damage due to the wrongful act of the other must be put in the position he or she would have been in had she or he not suffered the wrong**.** See ***Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.Civ.Appeal No.17 of 1992.*** It is also trite that the party should lead evidence or give indication that such damages should be awarded on inquiry as the quantum. ***See Ongom v. Attorney General [1979] HCB 267.***

The Respondent pleaded general damages in paragraph 9, and 11 (c) of the plaint, and at page 4 of the proceedings, led evidence as to what loss and damage he suffered as a result of the Appellants' trespass on his land, when they drove their herds of cattle onto his banana plantation and pasture, which caused damage and also deprived him of the usage of the said land since 2001 to date. To my mind this is ample factual basis upon which the trial court could exercise its discretion to award the general damages, as it did. I find that the trial court did not just spring to the award, but correctly applied sound principles of the law to the facts.

Further still, general damages need not be specifically pleaded, particularised and proved before they can be awarded since they are such as the law will presume to be the direct natural or probable consequence of the act or omission complained of. In that regard, I would

not find the award of Shs. 10 million to be as inordinately high or low as to represent an entirely erroneous estimate of the general damages. On the authority of ***Matiya Byabalema & 2 Or's v. Uganda Transport Co. (1975) Ltd. [1994-1995] HCB 64*** *(CA)* I find that the award of damages appropriately fits the circumstances of this case, and I decline to interfere with it. Ground 4 ought to fail.

GROUND 5.

The Appellants fault the trial court for the failure to weigh the evidence and to realise that the Respondent did not prove his case on the required standard. The instances cited in this regard are similar to those already advanced in the earlier grounds, and there is no need to repeat them. Needless to say that the standard of proof in civil cases is well settled. In the case of ***Sebuliba v. Co-operative Bank Ltd.[1982] HCB 129,*** it was held that the burden of proof in civil cases lies on the person who asserts or alleges, and the other party can only be called to dispute or rebut what has been stated by the party alleging.

Similarly in *locus classicus* case of ***Miller v. Minister of Pensions [1947]2 ALLER 372,*** Lord Denning aptly observed that the standard of proof in civil cases is on the balance of probabilities, and it must carry a reasonable degree of probability but not so high as is required in criminal cases. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged. See also ***Nsubuga v. Kavuma [1978] HCB 307,***

Having found in the earlier grounds that the Respondent duly proved that he legitimately purchased and occupied the 50 hectares of the suit land from the registered owner, it follows that the Respondent satisfactorily discharged the burden of proof imposed on him by law, and the trial court was justified in finding so. Accordingly, the decision of the trial court is upheld. The net effect is that the entire appeal fails, and it is dismissed with costs to the Respondent.

BASHAIJA K. ANDREW
JUDGE
30/04/2013